83 - 1422

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

FEBRUARY TERM, 1984

CITY OF PLEASANTON, ET AL.,

Appellants,

VS.

TRAVIS J. SMITH, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

ROBERT M. ROLLER*
JOHN M. HARMON
WILL GARWOOD, JR.
GRAVES, DOUGHERTY,
HEARON & MOODY
2300 InterFirst Tower
P. O. Box 98
Austin, Texas 78767
(512) 480-5600

Attorneys for Appellants

**Counsel of Record*

QUESTIONS PRESENTED

1. Whether a city's submission of a new proposed Home Rule Charter to the Justice Department for preclearance under § 5 of the Voting Rights Act of 1965 constitutes a submission of all the provisions contained in the Charter or rather, as held by the district court, only the provisions discussed specifically by the city in its transmittal letter accompanying the Charter.

2. Whether a three-judge United States Court may review the basis for the Justice Department's decision not to interpose an objection to a voting procedure formally submitted to the Attorney General for preclearance.

3. Whether an objection by the Justice Department to provisions in a Home Rule Charter concerning the method of electing councilmembers implicitly includes an objection to separate provisions in the Charter (contained in a separate section) concerning the recall of city officials.

PARTIES

There are two appellants: Danny Qualls, Mayor of Pleasanton, Texas, and Clem Titzman, Presiding Election Judge of Pleasanton. Both appellants were defendants in the case below. The other defendants were the City of Pleasanton and Elaine Tullos, City Secretary of Pleasanton.

The plaintiffs in the case below were Travis J. Smith, Abraham Saenz, Jr., and Johnny Bosque.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

FEBRUARY TERM, 1984

CITY OF PLEASANTON, ET AL.,

Appellants,

vs.

TRAVIS J. SMITH, ET AL.

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

JURISDICTIONAL STATEMENT

Appellants Danny Qualls, Mayor of Pleasanton, Texas, and Clem Titzman,

Election Judge of Pleasanton, respectfully pray that this Court summarily reverse the judgment of the United States District Court for the Western District of Texas entered on November 21, 1983, holding that the procedure for recall of city officials contained in the Pleasanton Home Rule Charter was not precleared by the Attorney General under the Voting Rights Act of 1965 and was, therefore, void.

OPINIONS BELOW

The district court opinion dated November 4, 1983 is unreported and is reprinted as Appendix A (hereafter referred to as "App."). The Announcement of Decision entered by the district court on October 7, 1983 is reprinted as Appendix B. The judgment of the district court entered on November 21, 1983, is reprinted as Appendix C.

JURISDICTION

This is a direct appeal from the judgment of a three-judge district court convened pursuant to 28 U.S.C. § 2284 to

hear an action challenging the validity of a municipal recall election on the basis that the recall provision in the City Charter had not been precleared by the Attorney General under the Voting Rights Act of 1965. On November 21, 1983, the three-judge court entered its judgment that the recall provision had not been precleared and, therefore, the recall election held pursuant to its terms was invalid. Appellants filed a notice of appeal in the district court on December 29, 1983. The notice of appeal is reprinted as Appendix D. This Court has jurisdiction of this direct appeal under 28 U.S.C. § 1253.

STATUTES INVOLVED

The principal statute involved in this case is § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1981). The statute is reprinted as Appendix E.

STATEMENT OF THE CASE

This is a direct appeal from a judgment of the three-judge United States District Court for the Western District

of Texas holding that the recall provision contained in the Home Rule Charter of the City of Pleasanton was not "precleared" under § 5 of the Voting Rights Act of 1965 and was void. The crucial issue in this case is whether a city's submission of its entire proposed Home Rule Charter to the Justice Department for preclearance constitutes a submission of all the provisions contained in the Charter or, rather as held by the district court, only the provisions specifically referenced by the City in the transmittal letter.

The City of Pleasanton is a small community located in South Texas.[1] Prior to 1982, it was a general law city governed by the general laws of the State of Texas. On August 9, 1980, a group of citizens residing in the City was elected to draft and present to the voters a home rule charter as authorized by Texas law. On May 17, 1983, after consultation with the Texas Municipal

---

[1]Pleasanton has a population of about 6,000.

League (a state advisory body which, inter alia, provides legal advice to small communities which do not have a city attorney) and review of the charters of other Texas cities, the Charter Commission presented a proposed charter and recommended that an election be held on August 14, 1982 for adoption of the Charter by the voters.

During the course of the formulation of the Charter, the City Manager was advised by the Texas Municipal League concerning preclearance procedures for the Charter. Accordingly, the City Manager had numerous telephone conversations with the Department of Justice on the proper manner of preclearing the Charter. In the course of these conversations, the Department specifically advised the Manager on the procedure for submitting the Charter and requested that when the Charter was submitted for preclearance, specific reference be made to the Charter provisions concerning election of the mayor since that provision would be closely scrutinized.

On May 25, 1982, the City Manager formally submitted the entire proposed Charter to the Justice Department for preclearance. In that regard, he forwarded two copies of the proposed Charter as instructed. Further, as directed by the Department, the City's cover letter specifically referenced the Charter provision for election of the mayor.

The Justice Department responded sixty-two days later with a letter dated July 26, 1982, stating, "This is in reference to the August 14, 1982 referendum election for the proposed city charter . . . submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965." In this letter, which was not sent until the referendum election was less than three weeks away, the Department asserted that it had insufficient information to evaluate the submission and requested additional information. Among other inquiries for additional information, the letter posed the following: "Indicate any other voting changes contained in the submitted

charter. Reason for adoption of those changes." (emphasis added).

On August 9, 1982, the City Manager made his response which included various documents and data requested by the Department. In reply to the request quoted above concerning "any other voting changes contained in the submitted charter," the City Manager offered his opinion that "no other changes affecting voting rights are proposed."

Prior to the election, the Justice Department advised the City that it could retroactively approve the Charter after the election and instructed the City Secretary to inform the public, through the local newspaper, of important provisions in the Charter. The Justice Department specifically instructed the City Secretary to include a discussion of Charter provisions concerning recall of council members. The Secretary complied with the request and published a lengthy article in the newspaper discussing specific Charter provisions including those dealing with recall.

On August 14, 1982 the proposed Home Rule Charter was approved by a majority of the legally qualified voters of Pleasanton.

On October 19, 1982 the Department wrote to the City that "your submission was completed on August 16, 1982." It also (1) expressly declined to interpose any objection to the Charter Commission election, the Charter adoption election, the adoption of bilingual election procedures and the method of electing the mayor, (2) objected to the election of councilmembers by numbered places instead of the previous "at-large" method, and (3) was silent as to all other provisions contained in the Charter.

Shortly after the voters' adoption of the Charter, the City remedied the Department's lone objection by passing an ordinance which deleted the Charter provisions providing for election of councilmembers by numbered places and restored the "at-large" method of electing councilmembers. That ordinance was forwarded to the Department and it

responded on December 20, 1982 that it interposed no objection to the ordinance.

The City continued to operate under the Charter without complaint or objection until August 1, 1983, when Plaintiffs filed their complaint requesting an injunction to halt an election to be held in Pleasanton to recall city councilman Travis Smith, one of the Plaintiffs. The principal ground asserted for issuance of an injunction was that the recall provisions in the Charter were not precleared and were void.

On August 11, 1983, the three-judge court denied the preliminary injunction and permitted the election to be held.[2] On August 13, 1983, Smith was recalled by the voters of Pleasanton.

The sole issue before the district court at trial was whether the recall provision of the Charter was submitted to the Attorney General for preclearance.

---

[2]The order denying the injunction provided that Smith would remain in office until the case was finally adjudicated even if he were recalled.

Appellants argued that submission of the Charter constituted a submission of all voting procedures contained in the Charter. Appellants further argued that the Justice Department's decision to treat the Charter as submitted and to interpose no objection to the recall provision was not subject to judicial review.

The court ruled that in its submission of the Charter, the City of Pleasanton failed to submit the provision for recall of city officials in an unambiguous and recordable manner. In the majority opinion, Judge Shannon stated as the basis for his decision that: (1) the burden rested on the City to point out any voting changes, and (2) the court could not clearly ascertain from the face of the record - the submitted documents and correspondence - that the Justice Department's attention had been directed to the recall provision. Therefore, the recall provision was not properly submitted for preclearance. App. A, A-1-8, A-1-9.

The district court found that the City submitted the entire Charter: "On May 25, 1982 City Manager Don Savage sent a letter and two copies of the proposed Home Rule Charter to the Justice Department for preclearance." App. A, A-1-3. And Judge Shannon did not dispute that the Justice Department considered the entire Charter to be submitted and made its review on that basis.[3] Under Judge Shannon's test, however, only the voting provisions discussed specifically by the City in the transmittal letter accompanying the proposed Charter or that he could readily ascertain were considered and approved by the Justice Department were properly submitted for preclearance. Judge Shannon thus concluded that submission of the Home Rule Charter for preclearance did

---

[3]In that regard, Judge Shannon stated: "The Justice Department responded with a letter dated July 26, 1982, which acknowledged receipt of the proposed Charter and determined that the City had not sent sufficient information to enable the Department to properly evaluate the proposed Charter." App. A, A-1-4. (emphasis added).

not constitute a submission of its recall provision - or any other voting provision not specifically referenced in the transmittal letter - under § 5 of the Voting Rights Act.[4]

Judge Reavley dissented. App. A, A-2-1. Judge Reavley found that the only issue before the court was whether the proposed Charter was submitted to the Department for preclearance of its voting procedures. He noted that both the city officials and the Justice Department thought they were reviewing the entire Charter. The Department had reviewed the method of electing councilmembers where the City had not specifically referenced this change in its transmittal letter. App. A, A-2-2.

Judge Reavley noted that Congress provided for Attorney General preclearance of laws affecting voting rights and

---

[4]The court also held, sua sponte, that even if the recall provision was submitted, the Department's objection to the method of electing councilmembers by place implicitly included an objection to the recall provision. This holding will be discussed in part II of the following section.

procedures in order to eliminate the need for a declaratory judgment action. Concerns over delay had also caused Congress to place a fixed time limit on postponing implementation of legislation in order to provide some degree of finality and certainty to the review. To limit Justice Department review to only those procedures which a court might, after the fact, find were in its view sufficiently highlighted by local officials would defeat the Congressional goal of a more expeditious and less burdensome review. App. A, A-2-4.

Citing Morris v. Gressette, 432 U.S. 491 (1977), Judge Reavley concluded that since: (1) the Charter was formally submitted for preclearance review; and (2) the Attorney General was given an opportunity to object to the proposed election procedures within the statutory time limits, and did not, the recall provision could be validly implemented by the City. Judge Reavley emphasized, however, that Justice Department preclearance of a provision like the recall provision did not bar a subsequent

judicial action to challenge the law's constitutionality. App. A, A-2-5, A-2-6.

THE QUESTION IS SUBSTANTIAL

The district court opinion that the recall provision was not validly precleared squarely conflicts with the statutory scheme of 42 U.S.C. § 1973(c) and this Court's decision in Morris v. Gressette, 432 U.S. 491 (1977). For the reasons that follow, the Court is urged to reverse summarily the district court's opinion and render judgment that the recall provision was precleared under the Voting Rights Act.

I.

The critical legal issue to be resolved is whether submission of the proposed Charter submitted all voting provisions contained in the Charter or only the voting provision specifically referenced in the City's transmittal letter.

Generally, before a state or its subdivisions may implement any new legislation concerning voting practices or

procedures, it must submit the legislation to the Attorney General. 42 U.S.C. § 1973(c). If the Attorney General interposes no objection within sixty days of submission, the legislation is deemed to be approved or precleared and may be validly implemented. Id.

Thus, with respect to any legislation required to be approved, the only pertinent questions are whether it was submitted and whether the Attorney General interposed an objection within sixty days.[8] Under Morris, courts may not look beyond those issues in order to review the analysis or decision-making process of the Attorney General or even to determine if the Attorney General was negligent, mistaken or overlooked a crucial factor or provision. For instance, in Morris the Attorney General did not object to submitted legislation because he mistakenly believed that he should

---

[8]The Attorney General may postpone the commencement of the 60-day period once if he believes he has inadequate information to evaluate the submission and requests additional information.

not do so while litigation was pending on the matter. His subsequent attempt to interpose an objection after the sixty-day period was ineffectual.[6]

---

[6]In Woods v. Hamilton, 473 F. Supp. 641 (D.S.C. 1979), a case strikingly similar to the instant one, South Carolina submitted an act which had three components. The Attorney General responded by (1) expressly objecting to one component, (2) attempting to reserve the right to object as to another, and (3) failing to mention the third. In holding that the third component of the Act was precleared since the Attorney General failed to mention or interpose an objection, the Court stated:

> Whatsoever may have been the motive of the Attorney General in failing to object to the transfer of powers in his August 28, 1975 letter, the fact remains that the State submitted, the entire Home Rule Act and, under the law, the Attorney General of the United States was required to pass on all components of a completed submission at that time . . . .

Id. at 646. The Court also found that "whether by oversight or design, the Attorney General did not object to the [third component], and he [was] barred by his inaction." Id. at 647. The Woods court also relied on United States v.

(continued)

In the instant case, the court below looked behind the Justice Department's failure to object to the recall provision and inquired whether the Department ever considered and approved the recall provisions of the Charter. Under this Court's holding in Morris, that inquiry was error. The scope of inquiry is limited to whether a submission was made and the Attorney General's response thereto. In his dissent, Judge Reavley applied the letter test and found the recall provision precleared.

It is undisputed that the entire Charter was submitted for preclearance. However, citing Allen v. State Board of Education, 393 U.S. 544 (1969), Judge Shannon found that the City did not submit the recall provision in an unambiguous and recordable manner so that the Department could recognize and consider

---

Georgia, C/A 76-1531A (N.D. Ga. 1977) aff'd, 436 U.S. 941 (1978), where the Attorney General "overlooked" a change which was held to have nevertheless been precleared since no objection was interposed. Woods v. Hamilton, supra, at 646-47. See also Dotson v. City of Indianola, 521 F. Supp. 934 (N.D. Miss. 1981).

the provision. Judge Shannon believed that the importance of the recall provision was not readily apparent on the face of the Charter. Therefore, Judge Shannon undertook to determine whether the Justice Department had focused its attention on and approved the recall provision. Because the City's transmittal letter referenced a different voting provision (the election of the mayor) and did not direct the Department specifically to the recall provision, he concluded that the City did not effectively submit the recall provision.

The City's submission of the Charter for preclearance of its voting procedures, including the recall provision, however, more than meets the minimum requirements set down in Allen for proper submission of voting legislation to the Attorney General.[7] Two copies of

---

[7]In Allen, Mississippi officials failed to submit voting legislation for preclearance, but when the legislation was challenged before a three-judge court as not precleared they served copies of the trial briefs on the Attorney General. The state argued to this Court that service of the briefs

(continued)

the proposed Home Rule Charter were submitted to the Attorney General under the heading "Submission Under Section 5, Voting Rights Act, to the Assistant Attorney General, Civil Rights Division, United States Department of Justice." There is nothing ambiguous in the formal submission of the entire Charter and it was certainly submitted in recordable form. Moreoever, the submission was made in close consultation with the Justice Department, and the Department never notified the City that the submittal was improper. The majority's inquiry should have ended there. Allen does not limit submission to only those matters referenced or discussed in the transmittal letter enclosing the submitted legislation.

---

constituted "submission" for the purposes of 42 U.S.C. § 1973(c). It contended that Attorney General awareness of the state voting enactment was sufficient. This Court rejected that argument, holding that the State must submit the proposed legislation in an unambiguous and recordable manner directly to the Attorney General with a request for consideration pursuant to the Act. Allen, 393 U.S. 544, at 571.

The majority also tried to reinforce its determination that the City only effectively submitted those matters referenced in its transmittal letter (and in the majority's view considered by the Justice Department) by reviewing the City Manager's response to the Department's request for additional information. In doing so, the majority again fell into the pitfalls the holding in Morris v. Gressette sought to avoid. As stated above, the Department requested substantial additional information from the City in the course of its review of the Charter. One of the requests asked whether "any other voting changes [were] contained in the submitted charter." (emphasis added). In the letter enclosing all of the information and documents requested, the City Manager offered his opinion that no other changes "affecting voting rights" were proposed. The majority found that while there was no bad motive on the City's part, the response distracted attention from the recall provision. App. A, A-1-10, A-1-11. Thus, the majority felt further

justified in its belief that the Justice Department only considered the provision referenced in the letter transmitting the City's new charter. However, to the contrary, the exchange itself demonstrates that the Justice Department thought it was reviewing the entire Charter. (See the emphasized portion of the Justice Department's inquiry quoted above.) If, after receiving the additional material, the Department believed that it still had insufficient information to review the entire Charter, it could easily have objected to the entire Charter or objected to all parts of the Charter that it did not expressly approve. Since the Department was silent on the recall provision and did not interpose an objection, the recall provision was precleared as a matter of law.

Further, in retrospect, it is certainly arguable that the recall provision might have a potential impact on voting rights. However, as Judge Reavley stated in his dissent, any argument concerning the question is superfluous. Under proper and well established

principles, the Attorney General's analysis of legislation under the Voting Rights Act and the basis for his decision is not to be reviewed in the courts. This Court foreclosed any such review in Morris. Thus, whether the City's opinion concerning the affect of Charter provisions on voting rights was correct and whether, and to what extent, the Attorney General may have relied on the opinion is irrelevant and is just the sort of speculative inquiry this Court set out to eliminate. Otherwise, this Court would be inundated with an avalanche of litigation challenging the kind and quality of information and opinions provided the Department and the extent of the Department's reliance on such information and opinions.

The majority's holding that only those portions of the Charter referenced in the City's cover letter received preclearance brings into question the validity of all other actions the City has taken under its new Charter. This would be a disastrous result for a small town that adopted a plan of self-government

and spent at least half a year working with the Justice Department on the preclearance of that plan. As Judge Reavley stated, unless local governments can assume some finality of review from preclearance, many election laws will be left open to uncertainty. This is precisely what Congress sought to avoid in providing that legislation may be implemented upon Justice's failure to object within the prescribed time limit.[8]

---

[8]The recall provision was not the only new voting provision on which the Justice Department was silent; the Department did not expressly preclear or object to the provisions on Initiative and Referendum or Annexation. If a court is allowed to delve into the Attorney General decision-making process, as the majority did in this case, almost all precleared legislation would be cast into doubt and the statutory scheme destroyed. "Precleared" voting legislation could be challenged on the basis that the local officials submitted misleading or inaccurate information or failed to provide requested information that was available. Courts would then have to decide whether the Justice Department relied on the erroneous material or would have considered the unprovided document important, and to what extent it affected preclearance.

Even if it was proper for the majority below to inquire into the basis for the Department's failure to interpose an objection, the majority erred in concluding that the City did not adequately focus the Department's attention on the recall provision. The evidence introduced at trial conclusively proves that the Department reviewed the entire Charter. First, the Department understood that the entire proposed Charter was newly enacted legislation, Pleasanton's first self-government statute, and, as such, was a change from the existing law. Prior to submission, the Justice Department advised the City in numerous telephone conversations how to submit the Charter for preclearance. In telephone conversations after the Charter was submitted, the Department informed the City that the Charter would be reviewed for any discriminatory affect it might have on voting rights.

In determining that the City did not properly submit the recall provision of the Charter, Judge Shannon relied on

the fact that the City's submission cover letter directs the Justice Department's attention to the Charter provision dealing with the election of the mayor. But the uncontroverted evidence at trial was that the Department in telephone conversations had expressed concern over the method of electing the mayor and had instructed the City to make specific reference to it in the transmittal letter enclosing the submitted Charter. Moreover, as Judge Reavley noted in his dissent, the Department did in fact consider other provisions in the Charter not specifically referenced in the cover letter. The bilingual voting procedures, method of electing councilmembers, and the Charter adoption election were all expressly precleared in the Department response, although the cover letter only called attention to the method of electing the mayor. The fact that the Justice Department, in the course of its review, advised the City to publish information in the newspaper on the various new charter provisions, including specifically the recall provision, inescapably

demonstrates that the Department recognized and considered the recall provision.

II.

The majority below held alternatively that, even if the recall provision was submitted, the objection by the Attorney General to the method of electing councilmembers by place implicitly included an objection to the recall provision in the Charter. App. A, A-1-11. This issue was not raised by the parties before trial and was taken up by the Court on its own motion at the hearing. In any event, however, the majority's attempt to expand the Attorney General's objection was wrong as a matter of law.

First, there is absolutely nothing on the face of the objection interposed to the method of electing councilmembers that could be read as an objection to the recall provision. Second, Judge Shannon's reading of the Department's objection to include the recall provision flies in the face of its principal conclusion that the Department was not made aware of the

recall provision and, therefore, was given no opportunity to object. Third, it is illogical to read the objection to the method of electing councilmembers to somehow include the recall provision, as the recall provision also applied to all City officials, not just councilmembers. Finally, as noted above, uncontroverted evidence was introduced that the Department specifically instructed the City to publish a discussion of the recall provision in the local newspaper prior to the Charter election. It is therefore clear that the Department was aware of the recall provision and believed it was significant enough to require public discussion. If the Attorney General intended to object to the recall provision, he certainly had the information available to have done so explicitly. Further, the objection made by the Attorney General to the method of electing councilmembers was subsequently cured by the City with express Justice Department approval, and thus no objection of any nature whatsoever exists.

CONCLUSION

In Morris v. Gressette, this Court determined that the preclearance procedures were designed to be an expeditious method of obtaining preliminary review of legislative changes affecting voting rights. Thus, this Court held that the courts would not review the decision-making process of the Attorney General. Therefore, the only pertinent issues before the district court were whether the Charter was submitted and whether an objection was interposed. The entire charter was submitted for preclearance and no objection was made to the recall provision. For the reasons stated herein, the judgment below should be summarily reversed, and the case remanded to the district court with instructions to enter judgment that the recall provision of the Pleasanton Charter was properly submitted for Attorney General preclearance under the Voting Rights Act and, therefore, was validly enacted. Alternatively, the Court should note probable jurisdiction and set this case for briefing and oral argument.

83 - 1422

No.

In The

SUPREME COURT OF THE UNITED STATES

February Term, 1984

City Of Pleasanton, et al.,

Appellants,

vs.

Travis J. Smith, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

APPENDICES TO THE JURISDICTIONAL STATEMENT

Robert M. Roller*
John M. Harmon
Will Garwood, Jr.
Graves, Dougherty,
Hearon & Moody
2300 InterFirst Tower
P. O. Box 98
Austin, Texas 78767
(512) 480-5600

Attorneys for Appellants

**Counsel of Record*

TABLE OF CONTENTS

APPENDIX A

IN THE

UNITED STATES DISTRICT COURT

For The Western District of Texas
San Antonio Division

Travis J. Smith, Et al,

v.

City of Pleasanton, Et al.

Civil Action No. SA-83-CA-1678

MEMORANDUM OPINION

Before Reavley, Circuit Judge, Shannon and Garcia, District Judges.

SHANNON, District Judge:

This case concerns the issue of compliance with Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1981). Three city council members filed a complaint seeking to halt or declare

invalid an election held in the City of Pleasanton to recall one of the Plaintiffs, City Councilman Travis Smith. Plaintiffs claim that the recall provision contained in Article XII of the city's newly adopted Home Rule Charter had not been precleared by the Justice Department pursuant to the Voting Rights Act and that, therefore, the result of the recall election which took place on August 13, 1983, was void.

The crucial issues are two-tiered. The first is whether the City of Pleasanton submitted Article XII of its Home Rule Charter to the Justice Department for preclearance under the Voting Rights Act. If, indeed, it was submitted, then the Court must determine whether the Attorney General interposed an objection to Article XII. For reasons which follow, this Court holds that Article XII of the proposed Home Rule Charter for the City of Pleasanton was not properly submitted to the Justice Department, but that if it was, the Justice Department made objec-

tion to it. The recall election held pursuant to its terms in August of 1983 is, therefore, invalid.

Prior to 1982, the City of Pleasanton was organized under the General Laws of Texas and had no provision for recall of council members. City council members were elected by a plurality vote which had made possible the recent election of two Mexican-American members to the five member council.[1]

In 1980, city voters elected a group of citizens to draft and present to the voters a home rule charter as authorized by Texas law. The Home Rule Charter Drafting Commission presented the proposed charter to the City Council on May 17, 1982. On May 25, 1982, City Manager Don Savage sent a letter and two copies of the proposed Home Rule Charter to the Justice Department for preclear-

---

[1]The City of Pleasanton, with a population of approximately 6,000 people, has an ethnic composition that is 60% Anglo and 40% Mexican-American.

ance. The cover letter was entitled, "Re: Submission Under Section 5, Voting Rights Act Requesting Attorney General's Review of Article XI,[2] Section 5, of Proposed Home Rule Charter of the City of Pleasanton." The letter dealt solely with a proposed change in the manner of electing the mayor and affirmatively stated, "It is emphasized that the proposed change affects only the mayor's position and that the five at-large council members will continue to be elected by plurality under the proposed charter."

The Justice Department responded with a letter dated July 26, 1982, which acknowledged receipt of the proposed charter and determined that the City had not sent sufficient information to enable the department to properly evaluate the proposed charter. The letter focused on majority election of the mayor and the

---

[2]Article XI, § 5 deals with the election of mayor by majority vote and is to be distinguished from Article XII, the recall provision upon which this controversy is centered.

implementation of numbered positions for council members. Both issues spring from Article XI, Sections 5 and 4 respectively. In requesting additional information, the Justice Department's letter specifically required the City to: "8. Indicate any other voting changes contained in the submitted charter. Reason for adoption of those changes." The City Manager's letter in response, dated August 9, 1982, bore the same heading with reference to Article XI as did the letter of May 25. City's answer to the Justice Department's eight item request for indications of other changes was: "No other changes affecting voting rights are proposed." When asked to explain this statement at the trial, Mr. Savage testified that he did not perceive the proposed recall provision to be a change.

On October 14, 1982[3] the Justice Department objected to the City charter's implementation of numbered council positions as having the effect of diluting the minority vote. After the objection was interposed, the City Council passed an ordinance which eliminated numbered positions in city council elections and reinstituted election by plurality. Throughout this entire procedure no discussion or correspondence concerning the new recall provision took place. Section 5 of the Voting Rights Act requires states and political subdivisions to submit to the Attorney General for evaluation any legislation which alters existing voter rights or regulations.[4] The United

---

[3]The fact that the Justice Department did not object until the 60-day time period had apparently run is of no consequence in this case because the City waived this defense when it responded to the objection by voluntarily attempting to remedy the defect.

[4]City of Rome v. United States, 446 U.S. 156, 169 (1980) (explaining which political units are subject to section

(continued)

States Supreme Court in Allen v. State Board of Elections[5] required that the legislation in question be submitted "in some unambiguous and recordable manner."[6] The Justice Department has developed rules and regulations governing the required contents of a submission of proposed voting changes.[7] Every submittal must include a copy of the document which contains a change affecting voting.[8]

---

five preclearance procedures as determined in United States v. Board of Commissioners of Sheffield, Ala., 435 U.S. 110, 117-118 (1978)). For a definition of "political subdivision" see section 14(c)(2) of the Voting Rights Act as set forth in 42 U.S.C.A. § 1973l (West 1981).

[5]Allen v. State Board of Elections, 393 U.S. 544 (1969).

[6]Id. at 571.

[7]46 Fed. Reg. 875 (1981) (to be codified at 28 C.F.R. § 51.25).

[8]Id. § 51.25(a). The full text of subsection (a) requires: "A copy of any ordinance, enactment, order or regulation embodying a change affecting voting." Id.

Moreover, if "the change affecting voting is not readily apparent on the face of the document"[9] the state or political subdivision must also include "a clear statement of the change explaining the difference between the submitted change and the prior law or practice."[10] Further requirements include "(m) a statement of the anticipated effect of the change on members of racial or language minority groups."[11]

The adoption of a provision for recall by majority vote where none has

---

[9] Id. § 51.25(b). The full text of subsection (b) states:

> If the change affecting voting is not readily apparent on the face of the document provided under paragraph (a) or is not embodied in a document, a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting. Id.

[10] Id. § 51.25(b).

[11] Id. § 51.25(m).

previously existed constitutes a change in a standard, practice or procedure with respect to voting under the Voting Rights Act. Such a change should have been submitted to the Attorney General for preclearance in an unambiguous and recordable manner. Unambiguous and recordable manner means that the Court can look at the record of transaction--the correspondence and documents--and can with clarity ascertain that the Justice Department's attention has been directed to the proposed change. Such is not possible in this case. The burden clearly rests upon the City to point out changes.[12]

Buried in a thirty-one page charter containing nineteen articles, the recall provision is a change not readily apparent on the face of the document. The City failed to comply with federal regulation § 51.25 by not submitting a clear statement of the difference between Article XII and the prior law. The sub-

---

[12]See Allen v. State Board of Elections, 393 U.S. 544, 571 (1969).

mission cover letter of May 25, 1982, in its opening sentences clearly centers the Justice Department's attention on a totally different provision of the Charter.

> The enclosed proposed Home Rule Charter of the City of Pleasanton has been submitted for your review due to the fact that Article XI, Section 5, of the charter changes the method of electing the mayor . . . It is emphasized that the proposed change affects only the mayor's position . . . .

An even more serious distraction from the recall provision is found in the City's response of August 9, 1982, to the Justice Department's request for additional information. In this letter, the City leads the Justice Department away from Article XII when it responds to item 8 by affirmatively stating that "No other changes affecting voting rights are proposed." The City Manager testified at trial that he did not perceive the recall provision as a change affecting minority voting rights. While this statement

tends to show that there was no bad motive on the part of the City, it also supports the Plaintiffs' argument that no proper submittal of the recall provision occurred.

Even if one might conclude that Article XII was properly submitted, one must also conclude that objection to it was made. The Attorney General specifically objected to the implementation of numbered positions for council members because such a change would have allowed majority voters to elect every position on the council whereas a plurality at-large election permitted minority voters to elect two-fifths of the council. In essence, the Attorney General objected to majority control of the election process. Recall by majority as provided in Article XII runs afoul of this objection.

In its attempt to get preclearance following the objection, the City rejected that portion of the charter which set out the manner of election of council members by passing an ordinance

re-establishing at-large election by plurality vote. The City cannot now rely on its charter in order to execute an "end-around" attack upon the principle that city council elections shall not be controlled by the majority.

APPENDIX A-2

IN THE

UNITED STATES DISTRICT COURT

For The Western District of Texas
San Antonio Division

Travis J. Smith, Et al,

v.

City of Pleasanton, Et al.

Civil Action No. SA-83-CA-1678

REAVLEY, Circuit Judge, dissenting:

The sole issue before this court is whether the proposed charter for Pleasanton was "submitted" to the Attorney General for preclearance of its voting procedures under 42 U.S.C. § 1973c (1976). The City Manager of Pleasanton submitted the entire proposed charter under a May 25, 1982 cover

letter that began, "The enclosed proposed Home Rule Charter of the City of Pleasanton has been submitted for your review. . . ." Sixty-two days later the Justice Department responded with a letter stating, "This is in reference to the August 14, 1982 referendum election for the proposed city charter . . . submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965. . . ." I have no doubt that the city officials thought they were submitting the whole charter for preclearance. It also seems clear that the Justice Department thought they were reviewing the entire charter.

Although the city's cover letter stated that the "charter of the City of Pleasanton has been submitted for your review due to the fact that Article XI, Section 5, of the charter changes the method of electing the mayor," the Justice Department reviewed the method of electing council members and this change was not specifically pointed out to the department by the City of

Pleasanton. This voluntary review by Justice of a provision not specifically pointed out for review suggests to me that the Attorney General recognizes his burden to locate changes in government that may affect voting rights.

The Voting Rights Act protects one of our most fundamental rights--the right to participate in our government. It serves a noble ideal, but is a clumsy and cumbersome law to enforce. To review within sixty days of submission all questions of compliance with federal standards of all changes by every city, county or other governmental body in the nation is an onerous assignment. But that is part of the scheme Congress has provided--and for good cause.

We cannot realistically expect a city such as Pleasanton with a population of 6,000 and without a full time city attorney to identify subtle nuances of polity that may affect voting rights. I doubt, for example, that many well-intentioned officials would recognize the right to recall an elected official

by majority vote as a change affecting voting rights and patterns. I doubt that it would be wise to place the responsibility for identifying changes in voting procedures with the city and county officials. Congress specifically provided that the Attorney General pre-clear laws affecting voting rights and procedures. If we limit the review of these procedures to those portions of the proposed legislation highlighted by the local governmental entity, we ensure much delay and defeat a major objective of the review. Congress intended to eliminate the need to file a declaratory judgment action to determine that proposed legislation was valid under the voting rights act. Morris v. Gressette, 432, U.S. 491, 503 (1977). The delay attendant to such legal action would be unduly burdensome. Instead, Congress provided for a more expeditious review of election procedures through an administrative review by the Attorney General. 42 U.S.C. § 1973c (1981). Even under this method, Congress feared

the effects of delays in the review. Postponing implementation of the legislation was therefore to cease within a fixed time limit[1] to provide some degree of finality and certainty to the review.

For this reason the Supreme Court has held that the Attorney General's failure to impose a timely objection based on a complete submission would not postpone implementation of the state legislation. Morris v. Gressette, 432 U.S. at 504. Through its silence on a provision such as the recall provision, the Justice Department waives its right to delay implementation of the provision. This does not mean that the provision has been upheld under the Voting Rights Act. The statute expressly provides that preclearance shall not bar

---

[1]42 U.S.C. § 1973c (1981) provides that the Attorney General must make an objection within sixty days of submission. This time limit may be extended to allow sixty days for review from the date a complete submission, including new information requested by Justice, is tendered. Georgia v. United States, 411 U.S. 526, 539-540 (1973).

subsequent action to enjoin enforcement. Id. at 505. The presumption, however, is that the legislation may be implemented upon Justice's failure to object within the prescribed time limit and may be subsequently challenged only through judicial action.

Such a rule is essential to the operation of local governments under the Voting Rights Act. Local governments need a reasonably high degree of certainty that their proposed laws can be validly implemented. To hold that only those portions of the charter referenced in the city's cover letter received preclearance brings into question the validity of all other actions the city has taken under its new charter. Unless local governments can assume some finality of review from preclearance many election laws will be left open to uncertainty. This uncertainty is precisely what Congress sought to avoid.

This case should be decided on the basis of two simple questions: (1) was the charter formally submitted

to the Attorney General for preclearance review; and (2) was the Attorney General given an opportunity to object to proposed election procedures within the statutory time limits. I believe both requirements were satisfied.

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

For The Western District of Texas
San Antonio Division

Travis J. Smith, Et al,

v.

City of Pleasanton, Et al.

Civil Action No. SA-83-CA-1678

ANNOUNCEMENT OF DECISION

On this afternoon of the 7th day of October, 1983, the Court announced that it had concluded that Article XII of the proposed Home Rule Charter for the City of Pleasanton, Texas, had not been properly precleared by the United States Department of Justice and that therefore the recall election held pursuant to its terms in August of 1983 was invalid.

Judge Reavley dissented from this decision. The parties shall tender appropriate forms of judgment, and opinions will be prepared and filed by the Court in due course.

Signed and Entered this 7th day of October, 1983.

Fred Shannon,
U.S. District Judge

FOR THE COURT

APPENDIX C

IN THE

UNITED STATES DISTRICT COURT

For The Western District of Texas
San Antonio Division

Travis J. Smith, Et al,

v.

City of Pleasanton, Et al.

Civil Action No. SA-83-CA-1678

JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law filed herein:

It is ordered, adjudged and decreed that the Defendants, City of Pleasanton, Texas, and Danny Qualls, as Mayor of said City, and each of them, their agents, officers, employees, successors, and persons acting in concert

with them are enjoined from removing the Plaintiff, Travis J. Smith, from the office of Councilman, City Council, City of Pleasanton, Texas, on the basis of a recall election held against said Plaintiff in the City of Pleasanton, Texas, on or about August 13, 1983, or in any way interfering with his use, occupancy and enjoyment of said office during the balance of the term to which he had been elected on such basis.

It is further Ordered that the defendant Clem Titzman is dismissed from this cause as of October 7, 1983, on Plaintiff's motion made in open court on that date due to the mootness of the cause as to him.

Costs are taxed against the defendant, City of Pleasanton, Texas.

ORDERED this 21st day of November, 1983.

Fred Shannon,
U.S. District Judge
Western District of Texas

H.F. Garcia,
U.S. District Judge
Western District of Texas

Thomas M. Reavley,
U.S. Court of Appeals
Circuit Judge, Fifth
Circuit

APPENDIX D

IN THE

UNITED STATES DISTRICT COURT

For The Western District of Texas
San Antonio Division

Travis J. Smith, Et al,

v.

City of Pleasanton, Et al.

Civil Action No. SA-83-CA-1678

NOTICE OF APPEAL

Notice is hereby given that DANNY QUALLS and CLEM TITZMAN, Defendants in the above entitled cause, hereby appeal to the Supreme Court of the United States from the entire Judgment entered by this Court on November 21, 1983, dismissing Clem Titzman from this cause, enjoining Defendants from removing Travis Smith from the office of Councilman, City

Council, City of Pleasanton, Texas, on the basis of a recall election held on August 15, 1983, where Smith was recalled or in any way interfering with his use, occupancy and enjoyment of office during the balance of his term and declaring invalid the recall provision of the Home Rule Charter of the City of Pleasanton on the basis that it was not precleared in compliance with the Voting Rights Act of 1965, 42 U.S.C. § 1973(c) (1981). This appeal is taken under 28 U.S.C. § 1253.

Date: December 29, 1983

Graves, Dougherty, Hearon & Moody
2300 InterFirst Tower
P.O. Box 98
Austin, Texas 78767
(512) 480-5600

By _____
Robert M. Roller

ATTORNEYS FOR CLEM TITZMAN AND DANNY QUALLS

APPENDIX E

SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, 42 U.S.C. § 1973c

In relevant part Section 5 provides: "[W]henever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in

section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced, without such proceeding if the qualification, prerequisite, standard, practice or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made." 89 Stat. 400, 404, 42 U.S.C. § 1973c.

NO. 83-1427

IN THE
SUPREME COURT OF THE UNITED STATES
FEBRUARY TERM, 1984

* * * * *

CITY OF PLEASANTON, ET AL.,
Appellants,

vs.

TRAVIS J. SMITH, ET AL.,
Appellees,

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

* * * * *

MOTION TO DISMISS

* * * * *

JAMES G. MURRY
900 N.E. Loop 410
San Antonio, TX 78209

RALPH BROWN and
HARVEY L. HARDY
2008 NW Military Hwy
San Antonio, TX 78213

ATTORNEYS FOR APPELLEES

TABLE OF CONTENTS

INDEX OF AUTHORITIES

TREATISES

NO. 83-1422

IN THE
SUPREME COURT OF THE UNITED STATES
FEBRUARY TERM, 1984

* * * * *

CITY OF PLEASANTON, ET AL.,
Appellants,

vs.

TRAVIS J. SMITH, ET AL.,
Appellees,

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

* * * * *

MOTION TO DISMISS

Pursuant to Rule 16(1)(a) of the Rules of the Supreme Court of the United States, Appellees move the Court to dismiss the appeal herein on the ground that the appeal is not within the jurisdiction of this Court as hereinafter set forth.

STATEMENT

This is an appeal from a judgment of the United States Court for the Western District of Texas which granted an injunction from removing the plaintiff below, Travis J. Smith, from the office of Councilman, City Council, City of Pleasanton, Texas, on the basis of a recall election held against said Travis J. Smith in the City of Pleasanton, Texas, on or about August 13, 1983, and which also dismissed defendant below, Clem Titzman from said cause due to the mootness of the cause as to him.

The facts underlying the appeal are as follows: Three City Councilmen filed a complaint seeking to halt or declare invalid an election held in the City of Pleasanton to recall one of the plaintiffs, City Councilman Travis J. Smith. Councilmen, Smith and the only two Hispanic members of the Council, Abraham Saenz and Johnny Bosquez, (all Appellants herein) frequently voted together, par-

ticularly on matters of interest to the Hispanic community, and a recall movement was mounted to remove Smith from office, thereby eliminating the de facto Hispanic majority from the City Council and perpetuating the rule of the Anglo majority. Councilmen Smith, Saenz and Bosquez instituted this suit, claiming that the recall provision contained in Article 12 of the City's newly adopted Home Rule Charter had not been precleared by the Justice Department pursuant to the Voting Rights Act and that, therefore, the result of the recall election which took place on August 13, 1983, was void.

The United States District Court for the Western District of Texas comprised of a three-judge panel agreed with plaintiffs, the recall election was set aside and Smith retained his office. The City of Pleasanton elected not to appeal. Appellants, Danny Qualls and Clem Titzman, now attempt to perfect this appeal. Both Appellants were

joined in the suit only in their representative capacities as election judge and as Mayor. No damages or other relief whatsoever were granted against Appellant Titzman. The only relief granted against Appellant Qualls was to enjoin him in his capacity as Mayor from removing Appellee Smith from office.

ARGUMENT

The appeal herein is not within the jurisdiction of this Court because it was not pursued in conformity with Rule 10.4, Supreme Court Rules, in that Appellants are not true parties and have no basis upon which to appeal. The cases cited hereinafter fully establish the position of appellee.

Appellants have no basis upon which to appeal. They lack a status as real parties in interest; they lack a capacity to sue; they lack standing to appeal. In short, appellants have no special injury on which to be heard and no relief may be fashioned to aid them.

Appellants fail to meet the standard of a "real party in interest" so defined in the Federal Rules of Civil Procedure, R.17(2), which states in part:

> "Every action shall be prosecuted in the name of the real party in interest."

Professor Moore, in his work on federal practice stated:

> "Cases constituting the real party in interest provision can be more easily understood if its born in mind that the true meaning of the real party in interest may be summarized as follows: An action shall be prosecuted in the name of the party who by the substantive law, has the right sought to be enforced." 3A J. Moore, FEDERAL PRACTICE, ¶17.07 (2d Ed. 1969).

Moore's analysis has found general acceptance in the courts. See Young v. Powell, 197 F.2d 147, 150, n.10 (5th Cir.), cert.

denied, 339 U.S. 948 (1950); Dubuque Stone Products v. Fred L. Grey Co., 356 F.2d 718, 723 (8th Cir. 1970); See also Wright and Miller, FEDERAL PRACTICE AND PROCEDURE, Civil §§1545 --1553.

The above cited material is particularly on point since appellants Titzman and Qualls were sued in their representative capacities only, appellant Titzman having been dismissed from the original action due to the mootness of the action to him. Appellants have no substantive rights to be enforced in this matter, are not the real parties and have no justiciable interest or standing to maintain this appeal. "Merely because one may benefit by result in litigation does not make him the 'real party in interest' within the purview of the rule...." Armour Pharmaceutical Co. v. Home Insurance Co., 60 F.D.R. 592, 594 (N.D.Ill. 1973).

Even if appellants could allege some benefit from the outcome of an appeal, they

are still not considered interested parties under any stretch of the legal reasoning. The weight of case law is against them. Horwich v. Price, 25 F.R.D. 500, 502 (W.D.Mich. 1960); Racc v. Baker, 28 F.R.D. 354, 355-356, (N.D. Ind. 1961); Celanese Corp. of America v. John Clark Industries, Inc., 243 F.2d 880, 882 (5th Cir. 1957); Allen v. Baker, 327 F. Supp. 706, 710 (N.D.Miss. 1968). Indeed, an interested party must possess a significant interest in order to be a real party in interest to any litigation. "The meaning and object of the real party in interest principal...is that the action must be brought by the person who possesses the claim and who has a significant interest in the litigation." Virginia Electric and Power Co. v. Westinghouse Electric Corp., 485 F.2d 78, 83 (4th Cir. 1973). The Virginia Electric case is particularly applicable since, in the instant case, the only party

"who possesses the claim and who has significant interest" in reversal of the lower court's decision, the City of Pleasanton, has not appealed.

It is also conceivable that the decision of a final appeal could work an injustice upon appellees because the true interested party has not joined this appeal. The purpose of Federal Rules of Civil Procedure, R.17(a) is to protect parties against a subsequent action on a cause previously adjudicated. United Federation of Postal Clerks, AFL-CIO v. Watson, 409 F.2d 462, 470 (D.C. Cir. 1969). See also: Prevor-Mayersohn Caribbean v. Puerto Rico Marine, 620 F.2d 1, 4 (5th Cir. 1980).

Both Appellants were made parties to the suit in their representative capacities. Appellant Titzman was dismissed at trial because as election judge of an election that had already been held, the case was moot as to him. Appellant Qualls, as Mayor of the

Defendant City, was not dismissed at trial but absolutely has no interest in this case separate and apart from the City's interest. To permit Appellant Qualls to maintain this appeal individually, against the decision of a majority of the City's governing body, would perpetuate the majority rule of the City's Anglo establishment struck down by the trial court, and would frustrate the Congressional intent of the statute in question.

Neither party has been injured in any way. In order for appellants to gain standing, they must allege "a distinct and palpable injury to (themselves)...." Hope, Inc. v. The County of DuPage, 717 F.2d 1061 (7th Cir. 1983). See also: Southwestern Media, Inc. v. Albert M. Bau and Henry Jacobowitz, 708 F.2d 419 (9th Cir. 1983), (appellant dismissed for lack of standing because not a party to the original proceedings); In re Central States Electric Corp., 206 F.2d 70 (4th Cir. 1953),

(petitioners dismissed for not being party t original suit).

Of particular noteworthiness in the instant case in the ruling in Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). The United States Courts of Appeals for the District of Columbia Circuit dismissed two appellants for failure to allege any personal interest, and therefore, for lack of standing to appeal. Hanson, a resigned superintendant of schools for the District of Columbia, and Smuck, a former member of the D.C. Board of Education, appealed an order from a suit against the board of education. The Board itself did not join the appeal, only Hanson and Smuck who were named in the original suit in their representative capacities appealed. The court allowed the intervention of school district parents as appellants but dismissed Hanson and Smuck. Id. at 179.

The court reasoned that Smuck and Hanson had no appealable interest apart from the

school board, which had decided not to appeal. "Appellant Smuck had a fair opportunity to participate in (the board's) defense, and in the decision not to appeal. Having done so, he has no separate interest as an individual in the litigation." Id.

Appellants Titzman and Qualls are in a remarkably similar situation in the instant case. The City of Pleasanton, the true protagonist, is absent from the case. Qualls, as Mayor of Pleasanton, was in a position to persuade the city to appeal. The city has not appealed and the appellants find themselves with no separate interest in this litigation. See generally: Elterich v. Arndt, 27 P.2d 1102 (9th Cir. 1933); State ex rel. Erb v. Sweaas, 107 N.W. 404 (1906).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal herein be dismissed.

Dated: March 13, 1984

Respectfully submitted

JAMES G. MURRY
State Bar No. 1473900
D-305 Petroleum Center
900 N.E. Loop 410
San Antonio, Texas 78209
Phone: 512/828-8171

RALPH BROWN
State Bar No. 03185000
2008 N.W. Military Highway
San Antonio, Texas 78213
Phone: 512/341-6642

HARVEY L. HARDY
State Bar No. 08986000
2008 N.W. Military Highway
San Antonio, Texas 78213
Phone: 512/341-6642

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed, certified mail, return receipt requested, to Robert M. Roller, GRAVES, DOUGHERTY, HEARON & MOODY, 2300 Interfirst Tower, P. O. Box 98, Austin, Texas 78767, on this the 16 day of February, 1984.

HARVEY L. HARDY

(THIS PAGE INTENTIONALLY LEFT BLANK)

No. 83-1422

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

CITY OF PLEASANTON, ET AL.,

Appellants,

VS.

TRAVIS J. SMITH, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

APPELLANTS' REPLY MEMORANDUM

ROBERT M. ROLLER*
JOHN M. HARMON
WILL GARWOOD, JR.
GRAVES, DOUGHERTY,
HEARON & MOODY
2300 InterFirst Tower
P. O. Box 98
Austin, Texas 78767
(512) 480-5600

Attorneys for Appellants

**Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NO. 83-1422

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

CITY OF PLEASANTON, ET AL.,

Appellants,

vs.

TRAVIS J. SMITH, ET AL.

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS

APPELLANTS' REPLY MEMORANDUM

ARGUMENT

Appellees do not address the merits of the case in their Response but

instead contend that appellants, defendants in the trial below, are not real parties in interest and lack standing to appeal the judgment entered against them by the district court. As authority for this position, appellees rely on Rule 17(a) of the Federal Rules of Civil Procedure and cite a number of cases which have applied the rule. However, Rule 17(a) and the cases cited by appellees are not applicable to the present case.

Rule 17(a) provides in pertinent part that "every action shall be prosecuted in the name of the real party in interest." The purpose of the rule is to provide that the person who has the substantive right shall sue, so that a defendant can insist upon a plaintiff who will afford him good res judicata protection if the dispute is carried through to a judgment on the merits. C. Wright, Handbook of Law of Federal Courts § 70, at 330-331 (3d ed. 1976). The Advisory Committee in its Note to the 1966 Amendment to Rule 17(a) stated

as the basis for the real party in interest rule:

> [T]he modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.

The cases cited by appellees in support of their argument that appellants are not real parties in interest all concern the issue of whether a plaintiff who has filed a lawsuit is the real party in interest entitled to prosecute the claim. But appellees are the plaintiffs in the instant case. Appellees named appellants as defendants in this suit and secured judgment against them in the court below. No authority is cited for the proposition that the real party in interest rule applies to a named defendant's appeal of an adverse judgment.

Similarly, appellees misapply the standing doctrine in arguing that appellants lack standing to appeal.

Standing to sue requires that a plaintiff have a personal stake and interest in the litigation so that the federal courts meet the Article III requirement of deciding only "cases" or "controversies." C. Wright, Handbook of the Law of Federal Courts § 13 at 43. Standing to sue concerns the issue of whether "the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise";[1] and if standing exists for appellees to have sued appellants in district court over the validity of the recall election - and neither side has questioned such standing - then standing exists for this Court to consider the appeal on its merits. Again, appellants are the named defendants in the action brought by appellees as plaintiffs in the court below. Standing limits the rights of potential plaintiffs to have any complaint redressed in the courts; it does

---

[1] Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, at 152 (1970).

not limit the right of a defendant to appeal a live judgment entered against him. Appellants' have a significant interest in this case as a matter of law as a result of the ongoing injunction imposed on appellant Danny Qualls in the district court judgment.

Even if the doctrine of standing and the rule of real party in interest were applicable to appellants' right to appeal in this case, appellees are judicially estopped from now claiming that appellants have no interest in the validity of the recall election. Appellees cannot sue appellant Qualls alleging that, acting in his official capacity as Mayor of Pleasanton, he has caused them injury and then urge, after obtaining judgment against him, that Qualls - still Mayor - no longer is a real party in interest for purposes of appeal.[3]

---

[3]In a somewhat analogous situation, it has been held that a defendant's failure to challenge a plaintiff as a real party in interest at a very early stage in the litigation (continued)

Even if status as a real party in interest and the standing doctrine were applicable to a named defendant's right to appeal a judgment against him, appellants Qualls and Titzman continue to have a significant interest in this case. Appellant Titzman, as presiding election judge, has an interest in seeing that the recall election over which he presided is upheld. Appellant Qualls, as stated above, is the Mayor of Pleasanton and is under a continuing court order specifically enjoining him from interfering in any way with appellee Smith's use, occupancy and enjoyment of the office of City Councilman. Thus, Qualls as Mayor has a direct, significant and continuing interest in the recall election and the legality of Smith's position on the council.

In addition to the continuing effect of the injunction, Qualls, in his official capacity as chief executive for

---

constitutes a waiver of the defense. Blau v. Lamb, 314 F.2d 618 (2nd Cir. 1963), cert. denied, 375 U.S. 813.

the City of Pleasanton, has a vital legal interest in this Court making a final determination as to the validity of the charter recall provision. As mayor he is under a duty to carry out the directives of the Pleasanton city council. The issue to be decided in this case is the validity of the recall election of councilman Travis Smith. If, as Qualls contends, the recall election was valid, the present council is not validly constituted and lacks authority to act. As mayor, Qualls cannot implement the decision of a council which he believes is invalidly constituted until a final judicial determination is made as to the recall of councilman Smith.[3]

---

[3]The only case cited by appellees involving a factually similar situation, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969), actually illustrates why Qualls has a significant interest in this action. In Smuck, the superintendent of a school district who was a named defendant in his official capacity in the original suit resigned before the appeal was taken. When he attempted to intervene in his individual capacity, (continued)

Appellants also have standing in their individual capacities to defend the recall election. As residents of Pleasanton who voted to adopt the Charter with its recall provision and as voters in the recall election attacked by appellees, Qualls and Titzman have a justiciable interest in the outcome of this case.[4]

---

the court ruled that he no longer had a significant interest in the subject of the lawsuit. Id. at 177. This is in contrast to the direct interest which Qualls continues to have in this action as Mayor of Pleasanton.

[4]Furthermore, appellants would have been entitled to intervene in this action even if they had not been named defendants in the original action. The case of Baker v. Regional High School District No. 5, 432 F.Supp. 535 (D. Conn. 1977) is directly on point. In Baker, certain members of a school district committee sought to intervene in an action in which the school district and its Board of Education were the principal defendants. The intervenors in Baker, like appellants in this case, defended the validity of a local ordinance against Plaintiffs' claim that the ordinance was unconstitutional. The Court granted the motion to intervene, citing the fact that the school district and its Board of Education had taken no (continued)

The thrust of appellees' argument for dismissal is that the city is the only party with a significant interest in the case and the city has not appealed.[5] For the reasons cited

---

position on the underlying issue before the court - allocation of membership on the Board of Education between three towns - and that intervenors had a direct interest in the membership of the school board as voters, residents and parents of school children. The interest of appellants in the validity of the recall election and a lawfully constituted city council is equally direct and compelling in the present case. If appellees could intervene as of right in this case they even more clearly have an appealable interest as named defendants in the original district court action.

[5]Appellants resent appellees attempt to characterize the recall election of councilman Smith as racially motivated. A substantial portion of the Hispanic community supported Smith's recall, including councilman Robert Brown who is Hispanic and filed an affidavit in support of Defendant's position in this case. Smith was petitioned for recall because of misconduct and irregularities in office; he is currently under indictment for aggravated perjury and has inter alia faced charges for violation of the Texas Open Meeting Act.

above, appellants have a justiciable interest in this case both in their individual and official capacities. Moreover, the very reason the city has not appealed is the direct result of the district court's decision reinstating Smith to the city council. The city council's decision whether to appeal depends on whether plaintiff Smith is validly on the city council - the precise issue which is before the court for adjudication. His vote prevents city action to appeal. To deny defendants/ appellants the right of appeal because of the effect of the very judgment they seek to review, would make the right of appeal illusory.

CONCLUSION

For all the reasons stated in appellants' jurisdictional statement and in this reply, the Court should summarily reverse the judgment of the three-judge district court and direct that court to enter judgment in favor of

appellants. In the alternative, the Court should note probable jurisdiction and set this case for briefing and oral argument.

Respectfully submitted,

Robert M. Roller*
John M. Harmon
Will Garwood, Jr.
GRAVES, DOUGHERTY, HEARON
& MOODY
2300 InterFirst Tower
P.O. Box 98
Austin, Texas 78767
(512) 480-5600

Attorneys for Appellants

*Counsel of Record

NO. 83-1422

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

CITY OF PLEASANTON, ET AL.,

Appellants,

vs.

TRAVIS J. SMITH, ET AL.

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

APPELLANTS' REPLY MEMORANDUM

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellants' Reply Memorandum has been placed in the United

States mail, postage prepaid, to all parties of record, addressed as follows, on this the 9th day of April, 1984.

Mr. James G. Murry
D-305 Petroleum Center
900 N.E. Loop 410
San Antonio, Texas 78209

Mr. Ralph Brown
Mr. Harvey L. Hardy
2008 N.W. Military Hwy.
San Antonio, Texas 78213

Robert M. Roller